

promulgating a final rule.<sup>36</sup> If the costs of compliance are too high; if compliance will preclude the introduction of new services; if the proposed standard cannot adequately protect privacy; then the Commission is authorized under Section 107(b) to reject the proffered capabilities. The result is that industry would not have to meet the capability requirement in order to have "safe harbor." By contrast, under Section 109, if the Commission finds that compliance is not reasonably achievable, carriers will be deemed in compliance unless the Attorney General agrees to pay the incremental costs necessary to make compliance achievable.

The Carrier Associations urge the Commission to conduct a thorough inquiry into the costs and impacts of CALEA compliance before finalizing its rule. Manufacturers will not want to develop hardware and software for CALEA compliance only to find that the cost is too much, they cannot make it available at a reasonable charge, and carriers are seeking relief at the Commission. Accordingly, the Commission should begin a reasonably achievable inquiry as part of this rulemaking; otherwise, it certainly will be faced with reasonable achievability petitions later, the determination of which will only further delay CALEA implementation and increase costs to all concerned.

## VI. CONCLUSION

The Carrier Associations urge the Commission to decide the legal issues associated with capability as soon as practicable after notice and comment. The Commission should remand to TR45.2 any revisions in the standard that are necessary as a result of this rulemaking so that voluntary compliance can be achieved in the most cost-effective manner. CALEA compliance should be suspended during this rulemaking and an industry-wide

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<sup>36</sup> Section 107(b) requires the Commission's final rule to (1) meet the assistance capability requirements of section 103 by cost-effective methods; (2) protect the privacy and security of communications not authorized to be intercepted; (3) minimize the cost of such compliance on residential ratepayers; and (4) serve the policy of the United States to encourage the provision of new technologies and services to the public. 47 U.S.C. § 1006(b)(1)-(4).

extension should be granted immediately. Finally, the Commission should commence an inquiry into whether compliance for pre-standard installed or deployed hardware and software will be reasonably achievable.

Dated: April 9, 1998

Respectfully submitted,

By Albert Gidari / *[Signature]*

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**UNITED STATES TELEPHONE ASSOCIATION**

### **CERTIFICATE OF SERVICE**

I, Martin P. Willard, hereby certify that on this 9th day of April, 1998, a copy of the forgoing Response to Petition for Rulemaking was delivered by hand to the following:

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The Honorable Susan Ness, Commissioner  
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APR - 9 1998

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of:

Establishment of Technical Standards  
for Telecommunications Carriers and  
a New Compliance Schedule under  
the Communications Assistance  
for Law Enforcement Act

)  
)  
)  
)  
)  
)

Docket No. \_\_\_\_\_

To: The Commission

RESPONSE TO PETITION FOR RULEMAKING

CELLULAR TELECOMMUNICATIONS  
INDUSTRY ASSOCIATION

PERSONAL COMMUNICATIONS  
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APR 2 - 1998

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

In the Matter of )  
 )  
Rulemaking Under Section 1006 )  
of the Communications Act of )  
1934, as amended, and Section 107 )  
of the Communications Assistance )  
for Law Enforcement Act to Resolve )  
Technical Issues and Establish )  
a New Compliance Schedule )

Docket No. \_\_\_\_\_

To: The Commission

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## SUMMARY

Both the Center for Democracy and Technology and the Department of Justice recently filed petitions pursuant to the Communications Assistance for Law Enforcement Act of 1994 ("CALEA"), challenging the industry "safe harbor" standard (J-STD-025) as deficient.

TIA respectfully requests the Commission to act promptly on both petitions and immediately initiate a rulemaking to resolve these challenges. Manufacturers currently are devoting enormous engineering resources to build the equipment and software to meet J-STD-025. The existence of these challenges -- seeking, alternatively, dramatic expansion and contraction of the standard -- has created great uncertainty about whether manufacturers will have to modify their solutions. To avoid unnecessary waste of time, engineering resources and lost opportunity costs, as well as to avoid further delays in implementing CALEA, manufacturers are in need of immediate guidance from the Commission.

Because, even on an expedited basis, the Commission's substantive determination may not be completed for several months, TIA hereby requests that the Commission:

first, immediately announce, at the beginning of its rulemaking, that enforcement of CALEA is suspended until the Commission issues its final determination;

second, establish, also at the beginning of its rulemaking, a reasonable compliance schedule of at least 24 months for manufacturers and carriers to develop, install and test the software and equipment necessary to implement the Commission's final decision;

third, establish an expedited schedule for addressing these challenges; and

fourth, should the Commission determine that J-STD-025 is deficient, remand any technical standardization work to TR-45.2.

TIA welcomes the Commission's resolution of this difficult dispute and hopes that a prompt solution will be possible.

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Telecommunications Industry Association ("TIA"),<sup>3</sup> and Committee T-1, which is sponsored by the Alliance for Telecommunications Industry Solutions.

Pursuant to section 107(b)(5) of CALEA and section 1.401 of the Commission's Rules, 47 C.F.R. § 1.401, TIA hereby respectfully requests the Commission to commence the requested rulemaking to resolve long-standing disputes as to whether the industry standard is underinclusive (as argued by law enforcement) or overinclusive (as urged by privacy advocates).<sup>4</sup> TIA also urges the Commission to announce, pursuant to the explicit authority granted to it under CALEA section 107(b)(5), that manufacturers should suspend development of capabilities to meet J-STD-025 during the pendency of this rulemaking and to establish a reasonable compliance schedule of at least 24 months from the Commission's final determination.

## I. Introduction

On March 26, 1998, the Center for Democracy and Technology filed a petition, pursuant to sections 107(b) and 109(b) of CALEA, asking that the Commission initiate a rulemaking to review the industry "safe harbor" standard, J-STD-025. The CDT contends that two provisions

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<sup>3</sup> TIA is a national, full-service trade association of over 900 small and large companies that provide communications and information technology products, materials, systems, distributions services and professional services in the United States and around the world. TIA is accredited by the American National Standards Institute ("ANSI") to issue standards for the industry.

<sup>4</sup> Section 1.403 of the Commission's Rules, 47 C.F.R. § 1.403, provides for notice and opportunity for comment in response to petitions for rulemaking filed under Section 1.401. See also Sections 1.405 and 1.407, 47 C.F.R. §§ 1.405 and 1.407. In view of the urgent need for the Commission to resolve these uniquely time-sensitive and important issues and to establish a new compliance schedule under section 107(b)(5) of CALEA, TIA requests that the Commission proceed directly to issuance of a Notice of Proposed Rulemaking in response to this Petition for Rulemaking. Authority for such action is contained in Section 1.3 of the Rules, 47 C.F.R. § 1.3, and Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(j).

of J-STD-025 regarding "location" and "packet data" exceed the scope of CALEA and, therefore, render the standard deficient. The CDT also urges the Commission to "reject any request by the FBI or other agencies to further expand the surveillance capabilities of the Nation's telecommunications systems" and to "find compliance with the assistance capability requirements not reasonably achievable for equipment, facilities and services installed or deployed after January 1, 1995, and indefinitely delay implementation of the statute, while industry develops a narrowly focused standard."

On March 27, 1998, the Department of Justice and the Federal Bureau of Investigation ("FBI") filed a similar petition, contending that J-STD-025 is deficient because it fails to include nine additional surveillance features (colloquially known as the "punchlist") that industry and the privacy community had determined exceed the scope of CALEA. The Commission should act on both petitions and immediately initiate a rulemaking to resolve these challenges and avoid further delay of implementation of CALEA.

The industry standard represents a good-faith effort by industry to balance society's competing interests in preserving individual privacy, technological innovation and public safety. Nevertheless, the ongoing dispute over whether J-STD-025 is consistent with CALEA's requirements has delayed implementation of the Act by more than two years. Accordingly, TIA welcomes the Commission's resolution of this prolonged dispute.

It is important that the Commission act promptly on the pending petitions, especially in providing manufacturers with immediate guidance regarding their compliance obligations. As the Commission is aware, manufacturers are devoting enormous engineering resources to build the equipment and software to meet J-STD-025. Software engineers at several manufacturers are

literally ready to enter the code for the software programs necessary to implement parts of J-STD-025. The existence of these challenges to J-STD-025 -- seeking, alternatively, dramatic expansion and contraction of the standard -- has created great uncertainty about whether manufacturers will have to modify their solutions. To avoid unnecessary waste of time, engineering resources and lost opportunity costs, as well as to avoid further delays in meeting the Congressional intent expressed when CALEA was passed, manufacturers are in need of immediate guidance from the Commission.

Because, even on an expedited basis, the Commission's substantive determination may not be completed for several months (or even by the October 25, 1998 compliance date), TIA requests that the Commission immediately announce, at the beginning of its rulemaking: 1) that enforcement of CALEA is suspended during the pendency of the rulemaking (as CDT has suggested) and 2) that manufacturers and carriers will have a reasonable compliance schedule of at least 24 months to develop, install and test the software and equipment necessary to implement the Commission's final decision. Otherwise, manufacturers will continue to have to devote scarce engineering resources to a solution that the Commission may subsequently modify.

In addition, TIA recommends that the Commission adopt, as the FBI has requested, an expedited rulemaking on the substance of the two petitions. Although these petitions concern complicated technical and legal issues, TIA is hopeful that a comment schedule similar to that in the Commission's recent Notice of Proposed Rulemaking (30-day comment period and 30-day reply period) will be sufficient.

Finally, as a further means of expediting this process, TIA suggests that -- if the Commission does determine that J-STD-025 is deficient -- the Commission identify the specific



capabilities it believes are required by CALEA and consider remanding any detailed, technical standardization work to Subcommittee TR-45.2 (the TIA standards group that initially developed J-STD-025 in cooperation with Committee T-1). This division of labor would permit the Commission to focus its resources on the legal question of whether J-STD-025 must be modified without having to develop the necessary implementing technical specifications. It would also allow TR-45.2 to ensure that any modified standard is consistent with existing industry protocols and capable of actual implementation.

## **II. The Commission Immediately Should Suspend Enforcement of CALEA During the Pendency of Its Rulemaking**

The Commission immediately should suspend enforcement of CALEA during the pendency of its rulemaking.<sup>5</sup> In section 107, Congress clearly anticipated the problems that would arise if the FBI did not agree with an industry standard's implementation of CALEA's capability requirements. The statute grants the Commission the authority to resolve disputes over industry standards and to set a compliance schedule for transition to the final standard that the Commission promulgates.<sup>6</sup> Until the current uncertainty surrounding J-STD-025 has been

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<sup>5</sup> Suspension of development work, however, will not effect the on-going pricing effort between manufacturers and the FBI. As the telecommunications industry has indicated in a recent letter to the Attorney General, manufacturers are committed to continuing that exercise. See letter from Messrs. Matt Flanigan (President, TIA), Jay Kitchen (President, Personal Communications Industry Association), Roy Neel (President, United States Telephone Association) and Thomas Wheeler (President, Cellular Telecommunications Industry Association) to the Honorable Janet Reno (March 20, 1998) attached as Appendix 1.

<sup>6</sup> See footnote 9, *infra*.

resolved, manufacturers should not be required to devote engineering resources developing and implementing a standard that may be radically modified in the next few months.<sup>7</sup>

Because any modification in J-STD-025 could require complex changes in a manufacturer's individual CALEA solution, proceeding in the face of the current challenges to J-STD-025 would cause manufacturers to waste valuable engineering resources, sacrificing other profit-making activity, and expose the companies to the prospect of having to create several versions of its CALEA solution.<sup>8</sup> This clearly would not serve the public interest. Even before the pending petitions, manufacturers were concerned about the inherent uncertainty in working to comply with a standard that the FBI had repeatedly said it would challenge. As a result, many manufacturers have been cautious about proceeding past feature specification development into actual implementation.

If a schedule for transition to the revised standard is not provided by the Commission and manufacturers are required to continue to develop CALEA solutions during the pending rulemaking, the various manufacturers' CALEA solutions will risk being incompatible with each other. System incompatibility is an enormous risk for service providers, manufacturers and the

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<sup>7</sup> Indeed, the Attorney General suggested as much in her recent testimony before the House Appropriations Subcommittee for Commerce, Justice, State and the Judiciary. In her testimony, the Attorney General stated that, in her opinion, initiation of this rulemaking would postpone the compliance date by at least 24 months -- for at least six months during the pendency of the Commission's review and for at least an additional 18 months after the Commission issues its final decision to allow industry to build and install the equipment necessary to comply with the Commission's determination. See Testimony of the Attorney General before the House Appropriations Subcommittee for Commerce, State, Justice, the Judiciary and Related Agencies (February 26, 1998).

<sup>8</sup> Design of the software and hardware necessary to implement CALEA capabilities is very labor intensive. As the Commission is well aware, the telecommunications industry is going through an enormous growth that has strained the pool for talented engineers. In addition, there are several other pressing technical issues -- such as Year 2000 ("Y2K") compliance -- that threaten reliability problems in the network if not resolved in a timely manner and compete for these scarce resources.

government. As the Commission is aware, local exchange, cellular and personal communications service ("PCS") providers' networks frequently intermix various manufacturers' telephone network elements. Thus, standards-based, compatible solutions are critical to ensure that such devices are fully interoperable.<sup>9</sup> Failure to ensure uniform engineering solutions will increase the risk of system unreliability, customer dissatisfaction and frustrated wiretap service. Rushing to cobble together disparate engineering solutions to avoid enforcement actions is sure to injure everyone.

Thus, the Commission should provide manufacturers with immediate guidance so that they will not have to make essentially irrevocable engineering choices until the Commission resolves whether the standard will expand, contract or remain the same.

**III. The Commission Should Establish, at the Beginning of Its Rulemaking, A Reasonable Compliance Schedule of at Least 24 Months from the Date of the Commission's Final Decision for Industry to Build and Deploy the Equipment and Software Necessary to Implement that Decision**

Under section 107(b) of CALEA, the Commission is required to "provide a reasonable time and conditions for compliance with and transition to any new standard."<sup>10</sup> As the

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<sup>9</sup> This fact was recognized by Congress in crafting CALEA to provide that industry (and not government) decide what data is to be provided to law enforcement. Thus, the statute is designed to permit industry, not law enforcement to promulgate safe harbor standards for CALEA capability. The law also clearly provides that only such "call identifying information" that manufacturers had themselves engineered into their devices must be provided to law enforcement, and only if that data is reasonably available to be extracted.

<sup>10</sup> Section 107(b) allows "a Government agency or any other person" that believes that an industry standard is deficient to "petition the Commission to establish, by rule, technical requirements or standards that --

- (1) meet the assistance capability requirements of section 103 by cost effective methods;
- (2) protect the privacy and security of communications not authorized to be intercepted;
- (3) minimize the cost of such compliance on residential ratepayers;
- (4) serve the policy of the United States to encourage the provision of new technologies and services to the public; and

(Continued ...)

Commission is aware, software development efforts for digital telephony enhancements require approximately 24 months of research and development time for manufacturers. In addition, manufacturers (working with their carrier customers) require several more months (approximately 6-12) to modify their equipment facilities and services to accept the new features and to test the implementation.<sup>11</sup> In the present situation, where Law Enforcement has expressed an inability to provide any sort of test bed or other facility against which manufacturers might test proposed solutions, the process could easily take longer.<sup>12</sup>

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(5) provide a reasonable time and conditions for compliance with and transition to any new standard, including defining the obligations of telecommunications carriers under section 103 during any transition period."

CALEA, § 107(b); 47 U.S.C. § 1006(b).

In considering what constitutes "a reasonable time" for compliance, the Commission should examine the other factors set forth in section 107(b). For example, if pressed to accelerate their development and implementation schedule to less than two years, manufacturers would not be able to meet the assistance capability requirements by the most cost-effective methods, as required by Section 107(b)(1).

Similarly, any increased costs suffered by manufacturers in attempting to satisfy the Commission's final determination in less than two years would inevitably be passed to carriers who (depending on whether they were reimbursed by the government) would be forced to pass the costs along to the ratepayers — a result directly contrary to the goal of minimizing the costs of compliance on residential ratepayers set forth in Section 107(b)(2).

Finally, forcing industry to become CALEA compliant in under two years would not serve "the policy of the United States to encourage the provision of new technologies and services to the public," as enormous amounts of time and engineering manpower otherwise employed in the provision of such desirable technologies to the public would have to be dedicated to satisfying the Commission's final determination.

<sup>11</sup> See Testimony of Matthew J. Flanagan (President, TIA) before the House Judiciary Subcommittee on Crime (October 23, 1997) attached as Appendix 2. See also TIA Comments and Reply Comments in the Commission's recent rulemaking, in the Matter of Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, FCC 97-356.

Similarly, in the implementation plan it submitted to Congress on March 3, 1997, the FBI acknowledged that standard industry practice requires at least six months of system engineering followed by an additional 12 months of engineering development before new features can even begin to be released to carrier-customers. Communications Assistance for Law Enforcement Act (CALEA) Implementation Plan, FBI, at 22 & 23 (March 3, 1997).

<sup>12</sup> Despite industry's repeated requests for such information, the FBI still has not identified the third-party vendor who is to build its collection "box" and when such a collection device would be available for interface  
(Continued ...)

Obviously, because manufacturers have already begun work toward implementing J-STD-025, depending on the extent to which the Commission leaves J-STD-025 unmodified, industry would not require the ordinary 30-36 months to develop and install software and equipment consistent with the FCC's final determination. However, as the Commission is well aware from its recent Notice of Proposed Rulemaking,<sup>13</sup> because of regrettable delays in the industry standards process (because of the on-going disputes over CALEA requirements) and the publication of the FBI's final capacity notice (well beyond the date Congress had anticipated), a two-year extension of the compliance date is already necessary.<sup>14</sup> Indeed, even the Department of Justice has recognized that an extension will be necessary, given manufacturers' current anticipated deployment schedules.<sup>15</sup>

Accordingly, the Commission should establish a reasonable compliance period of at least 24 months for industry to develop and install the software and equipment necessary to implement the Commission's final decision, irrespective of what that determination might be. This compliance period is consistent with normal industry practice as well as the Attorney General's recent testimony before the House Appropriations Subcommittee for Commerce, State, Justice

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testing with manufacturers' solutions. TIA would urge the Commission to use this rulemaking as an opportunity to obtain this critical information from the FBI.

<sup>13</sup> In the Matter of Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking, CC Docket No. 97-213, FCC 97-356 (released Oct. 10, 1997).

<sup>14</sup> See, e.g., the numerous Comments and reply Comments filed in the Commission's recent Notice of Proposed Rulemaking, including: Comments of the American Civil Liberties Union, at 6-10; Reply Comments of the American Civil Liberties Union, at 5-10; Comments of the United States Telephone Association, at 13-14; Reply Comments of the Personal Communications Industry Association, at 5-7; Reply Comments of the Telecommunications Industry Association, at 6-8.

<sup>15</sup> Joint Petition for Expedited Rulemaking, ¶ 118; Communications Assistance for Law Enforcement Act (CALEA) Implementation Report, at 15 & Appendix B (January 26, 1998).

and the Judiciary, where she estimated that industry would require at least 18 months to build the equipment and software necessary to conform with the Commission's final decision.<sup>16</sup>

TIA therefore respectfully suggests that allowing industry two years to achieve capability compliance after the promulgation of the new standard is a reasonable schedule. By promptly announcing that the October 25, 1998 compliance date has been tolled and that industry will be provided with at least 24 months to comply with any final decision it may reach, the Commission would permit both itself and industry to focus resources on expeditious resolution of the current petitions, rather than the hundreds (if not thousands) of separate petitions for extension of the compliance date (under section 107(c)) which industry is already preparing.

Finally, the Commission's extension should address the numerous industries (e.g., paging) for which neither capability nor capacity requirements have been established. Both J-STD-025 and the FBI's recently released Final Capacity Notice only address wireline, cellular and PCS providers.<sup>17</sup> Indeed, senior officials of both the Department of Justice and the FBI have recognized that, because of resource constraints, the FBI has not focused on other industries and that compliance for such industries will have to be postponed until after compliance for the wireline, cellular and PCS industries has been resolved. As a result, the Commission should

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<sup>16</sup> See Testimony of the Attorney General before the House Appropriations Subcommittee for Commerce, State, Justice, the Judiciary and Related Agencies (February 26, 1998).

<sup>17</sup> See Implementation of Section 104 of the Communications Assistance for Law Enforcement Act, FBI, 63 Fed. Reg. 12218, 12220 (March 12, 1998) ("this Final Notice of Capacity should be viewed as the first phase applicable to telecommunications carriers offering services that are of most immediate concern to law enforcement -- that is, those telecommunications carriers offering local exchange services and certain commercial mobile radio services, specifically cellular service and personal communications service."); Joint Petition for an Expedited Rulemaking by the Department of Justice and Federal Bureau of Investigation, ¶ 3 (filed March 27, 1998) (indicating that J-STD-025 only applies to wireline, cellular and PCS carriers).

ensure that the new compliance schedule extends to manufacturers of all telecommunications equipment, not just those explicitly covered by J-STD-025.

**IV. The Commission Should Establish an Expedited Schedule for Addressing the Complicated Technical and Legal Issues Raised by These Petitions**

All parties involved in this dispute would prefer as expeditious of a determination as possible from the Commission. Accordingly, TIA agrees with the Department of Justice's request that the rulemaking be placed on public notice as soon as possible.

As mentioned above, TIA urges the Commission to announce at the beginning of its rulemaking that: 1) compliance with CALEA is suspended during the pendency of the proposed rulemaking, and 2) that industry will be provided at least 24 months from the Commission's final determination to design, develop and install the software and equipment necessary to implement the Commission's decision. TIA also requests that the Commission announce a comment period similar to that adopted by the Commission in its previous Notice of Proposed Rulemaking -- with an initial 30 day comment period and a subsequent 30 days for reply comments.

As the Commission is well aware, these petitions concern complicated technical issues that are not always easily conveyed in writing. Thus, TIA's members are willing to make their engineers available to the Commission staff in any additional forum that the Commission might desire.

**V. Should the Commission Determine that J-STD-025 is Deficient, It Should Remand any Technical Standardization Work to TR-45.2**

In the event that the Commission determines that J-STD-025 must be modified, TIA suggests that the Commission remand any technical standardization work to the subcommittee

that originally created the standard -- TR-45.2. Delegation to TR-45.2 would permit the Commission to focus on the legal question of whether certain features must be added or removed from J-STD-025 and avoid expending resources creating technical specifications for any such modifications. Delegation to TR-45.2 would also allow that subcommittee to ensure that any modifications are harmonious with existing industry protocols as well as the new Lawfully Authorized Electronic Surveillance ("LAES") protocol, created by J-STD-025 specifically to implement CALEA.

On remand, the Commission should provide both: 1) detailed guidance of any modifications it has decided must be made in J-STD-025 and 2) a reasonable deadline for the subcommittee to complete its work (with an appropriate adjustment of the compliance date). The Commission could also consider assigning a staff member to participate in the proceedings. Depending on the number and technical complexity of any modifications, TIA would suggest a one year deadline for the subcommittee to publish any modifications,<sup>18</sup> with industry required to comply with the modified standard within 24 months.

## VI. Conclusion

TIA is proud of the hard work and good faith efforts made by the members of subcommittee TR-45.2 and Committee T-1 in establishing J-STD-025. The members of these bodies represent some of the finest system and design engineers in the world. For more than two years they worked closely with law enforcement to develop a standard that achieved

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<sup>18</sup> A one-year deadline is consistent with the schedule adopted for the current Enhanced Surveillance Services standards project. This project, which was initiated in January, is scheduled to go to ballot by January 1999, with a final publication date in April 1999.



Congressional intent and provided a careful balance between society's interest in preserving individual privacy, technological innovation and law enforcement's ability to execute court-authorized wiretaps.

TIA looks forward to the Commission's resolution of any remaining uncertainties surrounding this standard. Accordingly, TIA urges the Commission to immediately initiate this rulemaking, and to:

1. suspend immediately enforcement of CALEA until the promulgation of the Commission's final determination of this dispute;
2. establish, at the beginning of its rulemaking, a reasonable compliance schedule of at least 24 months for industry to develop and install the software and equipment necessary to implement the Commission's final determination;
3. establish an expedited schedule for addressing the complicated technical and legal issues raised by these petitions; and
4. should the Commission determine that J-STD-025 is deficient, remand any technical standardization work to TR-45.2.

Respectfully submitted,



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